Docket No: 01-0662
Meeting Date: 5/13/03
Deadline: N/A

M E M O R A N D U M

TO: The Commission

FROM: Eve Moran, Administrative Law Judge

DATE: May 12, 2003

SUBJECT: Illinois Commerce Commission,
On Its Own Motion

Investigation concerning Illinois Bell Telephone Company's compliance with Section 271 of the Telecommunications Act of 1996.

RECOMMENDATION: Deny the Motion.

The Motion:

On May 8, 2003, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA" or" the Movant") filed a Motion to Hold Issuance of Final Order in Abeyance and Conditional Request for Further Hearings. Under its pleading, this CLEC asks the Commission to:

(1) hold the issuance of a Final Order on Investigation in this docket in abeyance until the later of (i) the conclusion of the current session of the General Assembly, and (ii) if proposed legislation currently pending in the General Assembly as Senate Bill 885 ("SB 885") is passed, until SB 885 becomes law by signature of the Governor or operation of law pursuant to Article IV, Section 9(a) of the Constitution of 1970, or, if vetoed by the Governor, until the procedures specified in Article IV, Section 9 of the Constitution of 1970 for vetoed bills have been completed; and,

(2) if SB 885 is enacted, to hold further hearings prior to issuance of the final Order to take evidence on the determinations to be made in this docket that are impacted by SB 885, pursuant to 83 Ill. Adm. Code 200.870.

As part of its Section 271 "public interest" evaluation, McLeodUSA contends, the FCC is required to consider evidence of a "price squeeze", created by the relationship between the applicant regional Bell operating company's ("RBOC") retail rates and the rates for unbundled network elements ("UNE") it charges to competitive local exchange carriers ("CLEC"), that may preclude profitable local competition by CLECs (or explain why consideration of evidence of an alleged price squeeze is irrelevant to the public interest evaluation). See Sprint Communications Company, L.P. v. FCC, 274 F. 3d 549 (D.C. Cir. 2001).

Since both the RBOC's retail rates and its UNE rates would have been set by the state regulatory commission for the state in which the RBOC is seeking Section 271 authority, McLeodUSA believes it critical that the state regulatory commission also consider price squeeze evidence in performing its consultative role to the FCC.

On May 6, 2003, McLeodUSA points out, (and subsequent to the close of the "evidentiary" phase and briefing in this docket), Amendment No. 1 to SB 885 was introduced in the General Assembly. As amended by Amendment No. 1, it notes, SB 885 was passed by the House of Representatives on May 7, 2003. As so amended, McLeodUSA asserts, SB 885 would add to the Public Utilities Act new Section 13-408 which would mandate that the Commission utilize specified "fill factors" and depreciation rates/expense in setting the rates for unbundled loops leased by SBC Illinois to CLECs.

Further, SB 885 (new §13-408) would require the Commission to approve new SBC rates for unbundled loops within 30 days. Finally, SB 885 (new §13-408) would relieve SBC of the obligation otherwise imposed by 220 ILCS 5/13-505.1 to adjust its retail rates for the changes in its unbundled loop rates based on the "imputation" test prescribed under that section.

McLeodUSA believes that if SB 885 in its current form becomes law, and if the Commission were to authorize revised unbundled loop rates for SBC in accordance with SB 885 and without SBC being required to implement corresponding changes to its retail rates, (1) SBC's unbundled loop rates would be increased substantially over their current levels[1], and (2) the relationship between SBC's increased unbundled loop rates and its retail rates would result in a "price squeeze" for McLeodUSA and other CLECs as described in Sprint Communications v. FCC, *supra*. Further, McLeodUSA believes that the components of the unbundled UNE loop calculation as prescribed by SB 885

[1]At the request of certain members of the House Public Utilities Committee, McLeodUSA points out, representatives of the Commission testified (at that Committee's hearing on May 6, 2003), that SB 885, if enacted, would cause SBC's unbundled loop prices to increase as follows: Access Area A, from $2.59 to over $11; Access Area B, from $7.07 to $23; and Access Area C, from $11.40 to over $26. These estimates it asserts, are consistent with the estimates calculated on behalf of McLeodUSA.

(new §13-408) are not in compliance with TELRIC principles as enunciated by the FCC, and thus would result in SBC's unbundled loop rates being not TELRIC-compliant.[2]

In order to properly and adequately perform its consultative function with the FCC, McLeodUSA considers it imperative that this Commission consider evidence on, and take into account, the impact of unbundled loop rates set pursuant to SB 885 on the public interest under 47 U.S.C. §271(d)(3)(D) and on whether SBC Illinois' UNE rates are TELRIC-compliant. Certainly, Movant contends, a new TELRIC "zone of reasonableness" analysis is called for with respect to the increased UNE rates that would result from SB 885.

The prospect and impact of new, increased UNE rates resulting from SB 885 is a material new development, McLeodUSA asserts, that neither the intervenors nor Staff could have anticipated during the "evidentiary" and briefing stages of this docket. According to the Movant, Amendment No. 1 to SB 885 was first introduced in the House of Representatives Public Utilities Committee on May 5, 2003 (and the fact that SBC would be seeking to have such legislation introduced first became known only a few days before that). As such, McLeodUSA argues, SB 885 (as amended) is a material new development that mandates that the Commission hold final action in this docket in abeyance until it can be finally determined if SB 885 becomes law, and if it does become law, holds further hearings on the impacts of SB 885, as described above.

McLeod USA appears to suggest that the Commission's "public interest' analysis is incomplete at the moment. According to McLeodUSA, the Commission's Initiating Order in this docket recognized that the "public interest" requirement of the federal Act encompasses, among other things, the issue of "competition in local exchange and long distance markets." Initiating Order at 2, October 24, 2001. The Initiating Order further stated that:

> To the extent that a particular public interest issue is unrelated to the competitive checklist, but a party believes that it is important to the development of competition in Illinois, the party is free to comment on such issue. Should the ICC find such argument important to the development of local competition, it may, at its discretion, provide consultation on this issue to the FCC." (Id., p. 3).

Indeed, McLeodUSA notes that the ALJ's Post-Exceptions Proposed Final Order on Investigation for this docket, would have the Commission rule on various "public

[2]As this Commission recognized in the Phase 1 Interim Order on Investigation in this docket, in a Section 271 proceeding, the FCC may reject a Section 271 application if it finds that the RBOC's UNE rates violate basic TELRIC principles or fall outside the range that reasonable application of TELRIC principles would produce. See Phase 1 Interim Order on Investigation, par. 316-320. (These paragraphs are reproduced at par. 351-355 of the Post Exceptions Proposed Final Order on Investigation.)

interest" issues raised by the parties during this proceeding. See Post-Exceptions Proposed Order, Part IV (released April 29, 2003).

The Responses:

Timely with the schedule set out by the ALJ, responses to the McLeod motion were filed by: the Attorney General, SBC Illinois, WorldCom, CIMCO, Forte and XO.

The People's Response:

The People of the State of Illinois note that their Initial Brief, for Phase I of this docket, made clear that Bell Operating Companies (BOCs) seeking long distance authority must demonstrate that their entry into the long distance market is in the public interest. (People's Phase I Initial Brief at 25-33). So too, they observed, state commissions have regularly made separate determinations on whether specific applications under Section 271 are in the public interest. The People's initial brief cited to Section 271 proceedings in Michigan, New Jersey and Texas, as well as in other states, where the respective state commissions recognized that the public interest test was independent of state determinations on checklist compliance. (People's Phase I Initial Brief at 26-31). Further, that brief referred the Commission to the very decision cited by McLeod in its motion, i.e., Sprint v. FCC, 274 F.3d 549, 555-56 (D.C. Cir. 2001), for its finding that allegations of "price squeeze" in local markets implicated public interest considerations and required remand to the FCC. (Id. at 26).

In Sprint, the People observe, the Court indicated that the term "public interest" in section 271 must be considered in light of the purposes of the Telecommunications Act of 1996, to open local and long distance telecommunications markets to competition. As such, the Court held that the FCC must consider conditions that thwart that goal and retain monopoly dominance, such as the existence of facts that suggest or demonstrate a "price squeeze" that occurs when a firm with monopoly control over an input is "charging prices for inputs that preclude competition from firms relying on those inputs." 274 F.3d 549 at 553. According to the People, SB 885 includes language that would exempt SBC from meeting imputation requirements for, "unbundled network element rates set in accordance with the provisions of this Section" and may, therefore, create the potential for a price squeeze by raising the price of inputs that SBC controls (UNE's), and by exempting these prices from the "price squeeze" protections contained in the imputation provisions of the Public Utilities Act ("PUA"). 220 ILCS 5/13-505.1.

The People note that SBC's own witness in the instant docket acknowledged that, the Illinois commission's public interest analysis could consider "whether there are state-specific market structure conditions that would preclude a finding that the marketplace is open." (People's Initial Phase I Brief at 32, citing AI Ex. 15.0 at 11). In sum, the People agree with McLeodUSA that if SB 885, including House Amendment 1, passes the General Assembly and is signed into law, the Commission should consider the effect of the law on Illinois-specific market conditions and structure.

Under Sprint, they maintain, the FCC will be obligated to consider this issue when SBCI files its section 271 application. Given the state commission's role in advising the FCC, the Commission should look at this issue now, and include the analysis in its recommendation to the FCC.

CIMCO, Forte, and XO Response:

The response filed by CIMCO, Forte and XO indicates their concurrence with the instant motion. According to these CLECs, if SB 885 becomes law in Illinois, this Commission will be required to approve UNE rates that violate at least two of the items under section 271, i.e., Checklist Item 2, and the "public interest" standard.

CIMCO, Forte and XO point out that this Commission must follow the FCC's guidelines in setting prices for UNEs. The FCC, they inform, requires UNEs to be priced on forward-looking factors, and not current or historic factors. If the General Assembly requires this Commission to approve rates that use fill factors and depreciation rates that are not forward looking, these CLECs argue, then SBC Illinois will not meet with the FCC's pricing guidelines.

Stating their agreement with McleodUSA, these CLECs also contend that the Sprint court has directed the FCC to consider price squeeze arguments in section 271 proceedings. According to CIMCO, Forte and XO, the FCC, to date, has only faced the CLEC argument that the UNE prices and retail rates are insufficient to make an adequate profit or that CLEc profits are insufficient for certain areas of the state. Here, they claim, the FCC will need to consider that UNE rates will be higher than retail rates in all areas of the SBC Illinois territory.

As such, these CLECs assert, the Commission should consider evidence on, and take account of, the impact of unbundled loop rates to be set pursuant to SB 885 as a "public interest matter under Section 271 (d)(3)(D) and on the question of whether SBC Illinois' UNE rates would be TELRIC-compliant.

WorldCom Response:

In carrying out its duties to consult the FCC when SBC Illinois files its section 271 application, WorldCom notes that the Commission will proffer its opinion on a number of issues.

According to WorldCom, two critical issues on which the Commission will consult with the FCC center on whether the local market in SBC territory in Illinois is irreversibly open to competition and whether the Unbundled Network Elements ("UNEs") that SBC Illinois is obligated to provide are available on terms and conditions consistent with the Telecommunications Act of 1996 and the FCC's orders and rules. Among other things, WorldCom contends, the Commission must offer its opinion on whether those UNEs are priced consistent with the FCC's Total Element Long Run Incremental Cost ("TELRIC") standard.

It is undisputed, WorldCom maintains, that SBC Illinois relies upon its existing Commission approved UNE rates for purposes of Section 271 compliance. (Tr. 924). Shortly after the record in Phase 1 was closed and briefs filed however, WorldCom notes, SBC's filed tariffs seeking substantial increases in its UNE pricing. As such, the earlier concerns expressed by WorldCom and others about SBC's pricing and its potential impact on the competitive market in Illinois were well founded. Despite those warnings, WorldCom argues, and SBC Illinois witness Johnson's testimony that existing TELRIC rates are too low and her acknowledgment that the prices CLECs must pay for UNEs is a key factor in determining whether CLECs can compete and participate in the local exchange market, the Phase 1 Interim Order determined that the possibility of future UNE increases should not be an issue. Further, WorldCom points out, the Commission wrote:

> There are processes in place to protect the interests of all parties. In other words, there is no way that AI can unilaterally propose and put into effect its desired rates. See Maine 271 Order (noting the viability of this process). As such, if AI seeks to raise rates without good cause, it will be found out. If the evidence shows it is entitled, a finding as such will be rendered. There is no way to make a judgment now to interfere or prejudge the situation. The Commission cannot, and will not, speculate in these premises or interfere with a party's right to make its case. We flatly reject the instant proposal, further noting that the arguments on Exceptions are not persuasive. Phase I Interim Order at paras. 1655-1657, Docket 01-0662 (February 6, 2003) (Emphasis added).

The Phase I Interim Order, WorldCom observes, further indicated that:

> The FCC has itself recognized that "rates may well evolve over time to reflect new information on cost inputs and changes in technology or market conditions." Massachusetts 271 Order, 36. So too, it is well-established that before any new rates go into effect, interested parties will have the opportunity to comment and the Commission will decide then, based on the evidence, whether the new rates are lawful. See Maine 271 Order ("[T]o the extent Verizon proposes a DUF rate that is excessive and non-TELRIC based, WorldCom will have an opportunity to challenge that rate at the state level."). Id at Para. 24. No intervenor, AI observes, has or can dispute the Commission's aggressive application of the FCC's TELRIC pricing rules. In AI's view, Staff's proposal essentially asks the Commission to pre-judge the outcome of a proceeding that might take place at some future date, before any evidence is received and before any proceeding is even opened. Id. paras 1646-1648. (Emphasis added).

In WorldCom's view, the pending Motion makes clear that Senate Bill 885 (in its current form) takes away all of the due process rights that the Commission relied upon in Phase 1 in finding a UNE rate cap to be unnecessary. If Senate Bill 885 passes in its current form, WorldCom argues, it would likely result in significant and swift increases in UNE rates that directly and materially impact the ability of CLECs to effectively compete in the local market in Illinois. WorldCom's response concludes with the assertion that the Commission cannot consult with the FCC on SBC Illinois' 271 application without having evaluated the legislatively set UNE prices or their impact on the ability of CLECs to compete in SBC's territory in Illinois.

AT&T Response:

AT&T supports the McLeod Motion, for the reasons set out in its response. In particular, AT&T claims, if SB 885 becomes law in its current form, the resulting UNE rates would fail to comply with the FCC's TELRIC methodology and principles. Additionally, AT&T asserts, the resulting UNE rates would cause a "price squeeze" for Illinois CLECs providing local service in Illinois, thereby raising a serious issue of whether SBC Illinois's Section 271 application is consistent with the public interest, convenience and necessity, and whether the local exchange market in SBC Illinois's territory is "open and will remain so" after the grant of Section 271 authority, as the FCC requires. *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137, 12 FCC Rcd 20543, ¶¶ 391, 397 (1977); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, ¶¶ 431, 444 (December 1999); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, ¶ 431 (June 30, 2000).

Hence, AT&T Communications of Illinois, Inc. supports the McLeod Motion and the relief requested therein.

SBC Illinois Response:

SBC Illinois opposes the Motion filed by McLeodUSA which it views as nothing more than a transparent attempt to hold off this Commission's final decision on SBC Illinois' compliance with Section 271 of the Telecommunications Act. According to SBC Illinois, McLeodUSA raises no issues of fact or law as would justify either holding the issuance of a final order in abeyance or requiring further hearings in this proceeding.

In its response, SBC Illinois sets out several reasons why the McLeodUSA Motion should be denied.

First, SBC Illinois points out, the FCC has held that the UNE rates to be reviewed in assessing checklist compliance are the rates that are in effect at the time of filing. It

has consistently rejected the theory that potential future rate changes are a barrier to Section 271 approval.

In the Georgia 271 proceedings, SBC Illinois notes, CLECs opposed BellSouth's application on the ground that BellSouth had opened a new cost docket to establish new UNE rates. The FCC, however, held that "we do not believe that the existence of a new Georgia cost docket, without more, should affect our review of the currently effective rates submitted with BellSouth's Section 271 application." As the FCC explained:

> States review their rates periodically to reflect changes in costs and technology. As a legal matter, we see nothing in the Act that requires us to consider only section 271 applications containing rates approved within a specific period of time before the filing of the applications itself. Such a requirement would likely limit the ability of incumbent LECs to file their section 271 applications to specific windows of opportunity immediately after state commission have approved new rates to ensure approval before the costs of inputs have changed. We doubt that Congress, which directed us to complete our section 271 review process within 90 days, intended to burden the incumbent LECs, the states, or the Commission with the additional delays and uncertainties that would result from such a requirement. That a cost factor has changed does not always invalidate rates that were originally set according to a TELRIC process. As the D.C. Circuit stated, "[i]f new [cost] information automatically required rejection of section 271 applications, we cannot imagine how such applications could ever be approved in this context of rapid regulatory and technological change." In re Joint Application by BellSouth Corp. et. al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC Docket No. 02-35, 2002 WL 992213 (rel. May 15, 2002) at ¶ 96.

So too, SBC Illinois observes, in its Massachusetts 271 Order the FCC recognized that "the fact that a state may conduct a rate investigation and change the rates in the future does not cause an application to fail the checklist item at this time. Indeed, rates may well evolve over time to reflect new information on cost inputs and changes in technology or market conditions." In re Application of Verizon New England Inc., et. al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, 16 F.C.C. Rcd. 8988 (2001) at ¶ 36.

The issue of potential UNE rate increases, SBC Illinois asserts, has already been addressed in this proceeding. In Phase I, it notes, Staff and the CLECs asked the Commission to impose a five-year cap on UNE rates as a condition of an affirmative

Section 271 recommendation to the FCC, precisely because they were concerned that SBC Illinois would propose increases at some point in time. SBC Illinois points out that the Commission properly rejected this proposal, stating that to impose such a cap "… would be arbitrary and capricious"; and more specifically, the Commission noted that it could not …"speculate in these matters or interfere with a party's right to make its case." Phase I Interim Order On Investigation at ¶¶ 1656-57, Docket 01-0662, (February 6, 2003)("Phase I Interim Order"). In effect, SBC Illinois argues, McLeodUSA is using this Motion to obtain another bite at this rate apple.

Further, SBC Illinois sees McLeodUSA to argue that a new "zone of reasonableness" analysis of SBC Illinois' UNE rates would be required if UNE loop rates increase as a result of SB 885. (McLeodUSA Motion at 4). McLeodUSA is incorrect in its assertion, SBC Illinois says. Indeed, as this Commission has already recognized, a zone of reasonableness analysis is only required for interim rates. Phase I Interim Order at ¶¶ 717-20. According to SBC Illinois, any UNE loop rates resulting from SB 885 would be permanent rates.

SBC Illinois points out that it did, in fact, file updated UNE tariffs with this Commission – once in September, 2002 (a tariff filing which was subsequently withdrawn) and again in December of 2002. The December filing was suspended, SBC Illinois informs, and is currently being investigated in Docket 02-0864.

The increase in UNE loop rates pending in Docket 02-0864, SBC Illinois explains, is actually higher that what would likely result from the legislation. Yet, SBC Illinois asserts, no CLEC ever raised a price squeeze issue in Phase II of this proceeding, much less attempted to make the detailed showing required by the FCC. According to SBC Illinois, the mere fact that legislation is now pending that would result in an increase in rates – although less of an increase than that proposed in Docket 02-0864 – is not a material change in circumstances and in no way justifies the extreme relief requested by McLeodUSA.

Second, SBC Illinois points out, McLeodUSA's contention that SB 885 will result in UNE rates that are not TELRIC compliant is a matter of pure speculation. In SBC Illinois' view, the instant Motion rests on the improper assumption that, the General Assembly would adopt legislation that is contrary to law and the public interest. The Commission cannot conclude now, SBC Illinois asserts, that any revised UNE rates adopted pursuant to the legislation would violate TELRIC principles. According to SBC Illinois, the intent of the legislation – by its terms – is to require use of inputs that are TELRIC-compliant.

If SB 885 becomes law, SBC Illinois points out, this Commission will be obligated to implement it in accordance with the General Assembly's direction.[3] As such, SBC Illinois maintains, no judgment can be made about the resulting rate levels until the whole of the implementation process is complete. If at that time McLeodUSA is still

[3] See Order in Docket No. 01-0614, adopted June 11, 2002, at ¶¶ 42-43.

convinced that the final rates are not TELRIC compliant, SBC Illinois contends, it will have ample legal remedies at its disposal to address that issue.

Third, SBC Illinois asserts, the "price squeeze" issue raised by McLeodUSA is not one on which the state commissions must consult with the FCC in the first place. As a general rule, SBC Illinois notes, Congress did not authorize state commissions to act, even as advisors, with respect to the public interest analysis of Section 271(d). To be sure, SBC Illinois informs, Section 271(d)(2)(B) authorizes the FCC to seek state commission input only on the Track "A" and checklist requirements of Section 271(c).[4]

Although the FCC accepts state commission input on the public interest issue, SBC Illinois maintains that neither the Act nor the FCC requires it.[5] Given that the public interest standard "is a federal one" and the FCC has "developed a significant body of precedent" on the issue, the FCC is amply qualified to decide the issue. Id. Given the fact that McLeodUSA seeks to raise this issue only days prior to the Commission's final order, SBC Illinois contends that the Commission can and should proceed to decide the contested issues on the record as it currently exists.

Noting that McLeodUSA points to the appellate court decisions that required the FCC to consider price squeeze issues, SBC Illinois contends that. there is no dispute but that the FCC has been instructed to develop a more complete analytic framework for this issue. This responsibility however, SBC Illinois notes, was clearly assigned to the FCC, not to the state commissions. WorldCom, Inc. v. F.C.C., 308 F. 3d 1, 10 (D.C. Cir. 2002); Sprint Communications Company, L.P. v. F.C.C., 274 F. 3d 549, 555 (D.C. Cir. 2001). Notably, SBC Illinois would point out, neither remand decision interfered with the Section 271 applicant's ability to enter the long distance market and compete. Nor has the FCC denied Section 271 relief based solely on a price squeeze argument.

The FCC, SBC Illinois notes, considers price squeeze arguments as part of its "public interest" analysis under Section 271. [6] And, according to SBC Illinois, the

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[4] Section 271, pursuant to which this proceeding is being conducted, directs the FCC to "consult with the State commission . . . in order to verify the compliance of the [BOC] with the requirements of subsection (c)." 47 U.S.C. § 271(d)(2)(B). Subsection (c), in turn, contains only the Track "A" and "B" options (id. § 271(c)(1)), and the competitive checklist (id. § 271(c)(2)). The public interest analysis does not appear in subsection (c) but in subsection (d), which expressly assigns the task to the FCC.

[5] In re Application by SBC Communications, Inc. et al. for Authorization to Provide in Region, InterLATA Services in California, WC No. 02-306, 2002 WL 31842456 (F.C.C., Dec 19, 2002) at ¶ 169.

[6] See e.g., In re Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC No. 02-314, 2002 WL 31863801 (F.C.C., Dec. 23, 2002) ("Qwest Nine-State 271 Order") at ¶¶ 427-52.

FCC has further developed certain standards that CLECS must meet to make a price squeeze showing. The analyses it reviews are to include consideration of all of the revenue sources available to the CLEC.[7] The FCC has further stated that it is only concerned whether there is a "sufficient" profit margin for an "efficient competitor," and not any CLEC in particular. [8] If McLeodUSA and other CLECs have price squeeze concerns, SBC Illinois argues, they can and should develop the necessary evidence required by the FCC and present any price squeeze arguments to the FCC once SBC Illinois files its Section 271 application at the federal level.[9]

Further, SBC Illinois explains, the FCC has made clear that the price squeeze issue is just one component of its "public interest" analysis. According to SBC Illinois, the FCC weighs price squeeze contentions against other public interest issues, such as the state's legitimate interest in ensuring reasonably-priced retail services within the state and the public interest in promoting long distance competition:

> Consistent with our statutory obligations, we must consider the existence and scope of an alleged price squeeze along with all relevant public interest factors. Important public interest benefits are associated with approval of a Section 27 1application once an applicant has fully implements the competitive checklist. The opening of the local market, and the entry of the BOC into the interLATA market, leads to increased competition for all services. This competition, in turn, should foster efficiencies, innovations, and competitive pricing for communications services. A party alleging a price squeeze must show that the consequences of the price squeeze undermine these benefits.

In addition, in weighing any price squeeze allegation, we must consider whether the price squeeze is the result of a state commission policy to keep rates affordable in high-cost areas… It may be that until states rebalance residential rates, or make high-cost subsidies explicit and portable, UNE-P may not provide a viable means of entry for certain areas in some states. That fact, however, needs to be weighed against competing public policy interests, such as ensuring availability and affordability of local

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[7] In re Joint Application by Bellsouth Corp. et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, 17 F.C.C. Rcd. 9018 (2002) at ¶ 26.

[8] In the Matter of Verizon of New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware, 17 F.C.C. Rcd. 18,660 (2002) at ¶ 157.

[9] SBC Illinois believes that any UNE rate increases resulting from SB 885 would pass the FCC's price squeeze test. In fact, SBC Illinois presented such an analysis in the pending UNE proceeding (Docket No. 02-0864) in the testimony of Dr. Aron, which showed that its higher proposed rates in that proceeding meet the FCC's requirements.

telephone services in rural areas and the benefit to consumers from the BOC's entry into the interLATA market. Given the complex and competing public policy interests at stake, we do not think that we can conclude that the existence of subsidies in rural areas in itself is a circumstance that requires a finding that Section 271 authorization would not be in the public interest. (internal citations omitted).[10]

In sum, SBC Illinois asserts, the FCC, and not the states, was given the responsibility to balance these competing considerations.

All in all, SBC Illinois argues, The McLeodUSA motion is not supported by the facts or the law and should be denied. SBC Illinois maintains that it has stated repeatedly in this proceeding that the time has come to bring full telecommunications competition and its undisputed benefits to Illinois businesses and consumers.

The Replies

McLeodUSA Reply:

On May 9, 2003, McLeodUSA points out, Senate Bill 885 ("SB 885") passed the Illinois Senate and was signed into law by the Governor. As such, Movant asserts, the request for further hearings on the impact of the dramatically increased unbundled loop rates that will result from implementation of SB 885 is no longer conditional.[11] According to McLeod USA, the Commission should reopen the record to hold additional hearings and consider the impact of the increased UNE loop rates mandated by SB 885 on the public interest aspects of SBC's Section 271 application, and on whether those increased UNE loop rates are TELRIC-compliant and enable SBC Illinois to satisfy the competitive checklist with respect to UNE loops.[12]

Movant notes SBC Illinois' principal argument opposing the Motion at hand, is that the FCC has held that "the UNE rates to be reviewed in assessing checklist compliance are the rates that are in effect at the time of filing [the Section 271

[10] Qwest Nine-State 271 Order at ¶¶ 427-28.

[11]Thus, any concern the Motion might have raised to the effect that it might be necessary to hold issuance of the final order herein in abeyance for an extended time while SB 885 was pending in the General Assembly should now be eliminated.

[12]McLeodUSA believes that SB 885 mandates UNE rates that are not in compliance with TELRIC requirements, and that it conflicts with the Telecommunications Act of 1996 and FCC requirements thereunder, and thus is unconstitutional, in other respects as well. The fact that McLeodUSA responds herein to SBC's arguments "on the merits" should not be construed as a concession that SB 885 or the UNE rates it mandates are lawful.

application]".[13] McLeodUSA points out, however, that the FCC cases cited by SBC Illinois did not involve, and the FCC has never been confronted with, circumstances anywhere remotely like those presented by SB 885. Indeed, McLeodUSA believes that SB 885 is unprecedented in this country.

The situation confronting this Commission as a result of SB 885 is not simply a prediction of possible future rate increases, McLeodUSA argues, nor even a pending UNE rate increase request that is being litigated pursuant to 220 ILCS 5/9-201.[14] Rather, Movant asserts, SB 885 mandates that the Commission implement drastic increases[15] in unbundled loop rates within 30 days after SB 885's effective date, through a process that leaves the Commission virtually no discretion to exercise (as Commission representatives acknowledged in the legislative hearings on SB 885).[16]

In light of the passage and signing of SB 885 on May 9, even if the Commission were to issue the final Order in this docket and SBC Illinois were to file its Section 271 application at the FCC in the very near future, McLeodUSA argues, the increased UNE loop rates SB 885 mandates are likely to already be in effect when this Commission's consultative report is due at the FCC, and certainly while SBC Illinois' Section 271 is still pending.[17]

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[13]SBC's citation does not address the separate, public interest component of the Section 271 determination.

[14]Presumably, a significant reason why the FCC, in other Section 271 cases, has not considered pending state commission TELRIC dockets is the expectation that CLECs would have a due process opportunity to challenge the UNE rates proposed in the TELRIC dockets. However, there does not appear to be much time or opportunity for "due process" in the 30-day implementation mandated by SB 885 (and there was even less opportunity in the 5-day legislative process that resulted in SB 885, with interested parties being denied the right to testify in committee hearings, and even legislators complaining that their ability to ask questions was severely and unreasonably limited).

[15]SBC Illinois' Response to the Motion does not dispute the drastic increases in its unbundled loop rates calculated by Commission representatives (i.e., ranging from more than doubling to more than quadrupling) as set forth in footnote 1 of the Motion.

[16]Section 13-408(c), added by SB 885, states, "in making these rate adjustments, the Commission shall determine the specific required adjustments with respect to fill factors and depreciation lives by employing the models and methodology used to generate the proposed rates submitted by such incumbent local exchange carrier in ICC Docket 02-0864."

[17]McLeodUSA notes that it did not raise issues similar to the Motion when SBC filed its UNE rate cases in August 2002 (subsequently withdrawn) and on Christmas Eve, 2002 (which was Docket 02-0864), even though, according to SBC, the UNE rates produced by the latter filing are higher than those that would be produced by SB 885 (see SBC

Unlike the Massachusetts 271 Order cited by SBC, Movant argues, the result of SB 885 is hardly a case of "rates . . . evolv[ing] over time." Nor can SBC really assert that the loop rates and implementation procedure mandated by SB 885 "is not a material change in circumstances." The cases cited and arguments made by SBC on this point, Movant contends, are simply inapposite.

The Movant sees SBC Illinois to assert that it is "pure speculation" that SB 885 will produce UNE rates that are not TELRIC compliant. (SBC Response, par. 6) According to McLeodUSA, however, this is exactly the issue the Commission should evaluate on the basis of further hearings. McLeodUSA would note that at least one of the mandates of SB 885, the fill factors, is contrary to what this Commission adopted in Dockets 96-0486 & 96-0569 as TELRIC-compliant. And, it argues, no comfort should be taken from SBC's assertion that the General Assembly would not adopt legislation that is contrary to law and the public interest. Even with the best of intentions, McLeodUSA argues, the General Assembly has enacted unconstitutional legislation in the past, including amendments to the Public Utilities Act.[18] Finally, McLeodUSA asserts, given the highly prescriptive nature of SB 885 (and the undisputed estimates of the resulting loop rates that Commission representatives have already calculated), SBC's assertion that "no judgment can be made about the resulting rate levels until the implementation process is complete" is without merit. In any event, the Movant asserts, the "implementation process" will be complete in very short order.

Further, the Movant notes SBC to assert that, it is the FCC, and not the state commissions, which determines if the interplay of the retail and UNE rates of a Regional Bell Operating Company ("RBOC") applying for Section 271 authority create a price squeeze. (SBC Response at 4-6). This argument proves nothing, McLeod USA argues, because in determining whether an RBOC is entitled to Section 271 authority, the FCC makes *all* the necessary determinations – the state commission's role is advisory (albeit important and, hopefully, highly influential) in all respects.

Response, pp. 3-4, par. 5). McLeodUSA did not do so because it expected, correctly, that SBC's proposed UNE rates would be subjected to a full investigation and review by this Commission in a contested case proceeding in which McLeodUSA and other CLECs would have full due process opportunity to evaluate and dispute SBC's TELRIC studies and contest SBC's proposed rate increases. McLeodUSA (and other CLECs) also expected that a full evidentiary hearing would result in SBC's proposed increase in UNE loop rates being substantially reduced or eliminated. In fact, not even SBC's rate witness in this case expected the Commission to approve the rates proposed by SBC in Docket 02-0864. (See, e.g., Tr. 2826-27) However, as detailed in WorldCom's Response to the Motion, the CLECs' legitimate expectations are eviscerated by SB 885.

[18]See, e.g., former Section 8-402.1 of the Act, enacted in 1991 and declared unconstitutional in Alliance for Clean Coal v. Craig, 840 F. Supp. 554 (N.D. Ill. 1993), aff'd sub nom. Alliance for Clean Coal v. Miller, 44 F. 3d 591 (7 Cir. 1995).

Noting SBC Illinois to further argue that this Commission's consultative role is limited only to "Track A" and competitive checklist compliance, and that this Commission should have no role in the public interest determinations, McLeodUSA points to the Phase 1 Interim Order and the proposed Final Order on Investigation as a clear indication that SBC has already lost that argument in this docket. In McLeod's view, SBC's argument ignores this Commission's clear pronouncements in the Initiating Order for this docket that the public interest requirement of Section 271(d)(3)(C) encompasses, among other things, the issue of "competition in local exchange and long distance markets" (Initiating Order dated Oct. 24, 2001, p. 2), and that:

> To the extent that a particular public interest issue is unrelated to the competitive checklist, but a party believes that it is important to the development of competition in Illinois, the party is free to comment on such issue. Should the ICC find such argument important to the development of local competition, it may, at its discretion, provide consultation on this issue to the FCC. (Id, p. 3; emphasis supplied)

Rate-setting, and judging the impacts of the rates it sets, McLeod asserts, is arguably this Commission's most important function, and one of its areas of greatest expertise. It would be a strange exercise of this Commission's discretion, McLeodUSA argues, for it to decide that the massive increases in UNE loop rates mandated by SB 885 – coupled with its exemption of those increased loop rates from the "imputation test" requirements for SBC's retail rates otherwise imposed by 220 ILCS 5/13-505.1 – are not "important to the development of local competition" and thus, to the public interest.[19] Indeed, despite SBC's arguments, McLeodUSA observes, its rate witness in this docket knew exactly the reason that SBC's UNE rates needed to be examined in this proceeding:

> what we are trying to do here is to try and say, you know, Are the rates reasonable that we have in Illinois and is that going to hinder competition? . . . What I want to do is kind of elevate from the granule level and look at it from a broader picture; does it make sense? Is it reasonable? And is it

[19]However, even if SBC were correct (which it is not) that the Commission should not provide consultation to the FCC, under the "public interest" rubric, on the price squeeze or other impacts of the rates resulting from SB 885, the Commission must nonetheless, as described herein and in the Response of CIMCO Communications, Forte Communications and XO Illinois, evaluate the RBOC's UNE rates as a matter of checklist compliance.

> competitor impacting? And I don't think it is. (Tr. 2821-22) (Emphasis added).[20]

The Movant also notes SBC Illinois to assert that the FCC has developed tests for determining whether an RBOC's rates create a price squeeze that involve examining all of a CLEC's revenue sources and whether the RBOC's rates create a sufficient profit margin for an efficient competitor. (SBC Response, pp. 5-6). It is quite ironic, McLeodUSA observes, that SBC, which has complained long and loudly about the putative impacts on its profitability of leasing UNE loops in Illinois (a relatively small part of its business) while reporting hundreds of millions of dollars of corporate profits from its overall business operations, would make this argument. According to McLeodUSA, the People's response cogently points out that, the judicial test for a price squeeze in the Section 271 context is:

> A "price squeeze" occurs when a firm with monopoly control over an input is "charging prices for inputs that preclude competition from firms relying on those inputs." See Response of the People of the State of Illinois, at 2, quoting Sprint Communications Co., LP v. FCC, 274 F. 3d 549, 554 (D. C. Cir. 2001).

While the existence of a "price squeeze" due to SB 885 should be fully evaluated by the Commission in the additional hearings that McLeodUSA along with numerous other parties are requesting, the Movant submits that it is rather obvious that the loop rates resulting from SB 885 may result in negative profit margins for CLECs. For example, McLeodUSA argues, based on the Commission-supplied estimates, the monthly SBC unbundled loop rates resulting from SB 885 will be at or above $11, $23 and $26 in Access Areas A, B, and C, respectively, as compared to monthly single line business access revenues under SBC's retail rates estimated at $12.02, $15.23 and $18.89 for Access Areas A, B and C, respectively.[21] Given the provision of new Section 13-408(d) effectively nullifying the imputation requirements of 220 ILCS 5/13-505.1, and the fact that SBC effectively represented in the General Assembly that retail prices would not increase due to SB 885, McLeodUSA argues, it is clear that CLECs now face

[20]Mr. Wardin's conclusion related to SBC's "interim" rates. However, the Commission must now make this determination based on the SB 885 UNE loop rates.

[21]Revenue figures taken from Joint CLEC Exhibit 3.0, the Direct Testimony of Dr. August H. Ankum, and Attachment 2 thereto, in Docket 02-0864. SBC asserts that the analysis presented by its witness Dr. Aron in Docket 02-0864 shows that the UNE loop rates resulting from SB 885 will pass the "price squeeze" test. (SBC Response, p. 6 n. 9) However, the accuracy and validity of Dr. Aron's analysis has been sharply controverted by the evidence filed by CLECs and other parties in Docket 02-0864 such as Dr. Ankum's testimony. In any event, Dr. Aron's and Dr. Ankum's pre-filed testimonies and those of other pertinent witnesses in Docket 02-0864 only show the **need** for further hearings in this case, not the basis for a final determination

a monumental price squeeze in all SBC access areas in Illinois. McLeodUSA believes SBC Illinois' Section 271 case is the first one in which competitors face a substantial price squeeze in all UNE rate zones.

McLeodUSA agrees that price squeeze is one of many factors that the FCC may consider under the "public interest" criteria. However, McLeod argues, that does not mean that the state commission should not consider whether there will be a price squeeze, and provide input to the FCC on that topic. As McLeodUSA contended, and other parties have stated in this proceeding, this Commission should provide a positive recommendation to the FCC on SBC Illinois' Section 271 application only if this Commission has concluded that SBC Illinois' local markets are **irreversibly open to competition**.[22] The enactment of SB 885 casts considerable doubt on the likelihood that SBC Illinois' local markets are irreversibly open to competition. In fact, because of SB 885, for many CLECs, many segments of the Illinois market are likely to be impossible to serve economically due to the price squeeze. This Commission **must** investigate this issue, McLeodUSA argues, before it issues its order in this case, and renders its recommendation to the FCC.

Further, McLeodUSA sees SBC to argue that the "zone of reasonableness" review is only required for interim UNE rates, not for permanent UNE rates such as will result from SB 855. (SBC Response, p. 3) According to the Movant, SBC overstates the import of the portion of the Phase 1 Interim Order (par. 717-20) it cites and the FCC order cited therein. The Texas 271 Order cited at paragraph 718 of the Phase 1 Interim Order only specifies that a Section 271 application will not be stymied by the fact that the RBOC has interim UNE rates in effect. However, TELRIC-compliant UNE rates is still a requirement for compliance with checklist item 2, as recognized at paragraphs 316-320 of the Phase 1 Interim Order.

For the reasons set forth in McLeodUSA's Motion and in this Reply, (as well as in the Responses of the People of the State of Illinois, AT&T, WorldCom, Cimco Communications, Forte Communications and XO Illinois) the Commission should reopen the record pursuant to 83 Ill. Adm. Code 200.870 and hold further hearings, prior to issuance of the final Order in this docket, to take evidence on the determinations to be made in this docket that are impacted by SB 885 (i.e., new Sections 13-408 and 13-409 of the Public Utilities Act), and it should incorporate the results of those hearings in its final Order herein.

CIMCO, Forte, and XO Reply:

According to CIMCO, Forte and XO, the enactment of senate bill 885 ("SB 885") changes the course of this proceeding. As they see it, SBC Illinois would have the Commission be helpless of the fact that SBC's UNE rates are soon to be increased in a manner that directly calls into question whether SBC's UNE rates will be TELRIC

[22]See, e.g., Initial Phase 2 Comments of McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC, pp. 2, 5.

compliant under a Checklist Item 2 analysis. And, SBC Illinois would have the Commission ignore its duty to analyze whether SB 885 will create a "price squeeze" as part of Section 271's public interest standard. SBC's arguments are both directly contrary to the Commission's purpose in this proceeding – to establish a complete factual record and make a recommendation to the FCC based on that record. The Commission should rule in favor of MTSI's Motion to Hold Issuance of Final Order in Abeyance and Conditional Request for Further Hearings.[23]

Price Increases

SBC first claims that the FCC "has consistently rejected the theory that potential future rate changes are a barrier to Section 271 approval." (SBC Response at 2) Here, however, there is no longer any question that SB 855 will increase SBC's rates. Moreover, SB 855 clearly shows *how* SBC's rates will be increased. SB 855 requires the ICC to develop rates that use fill factors and depreciation rates that are not forward-looking. The use of current figures rather than future figures clearly raises into question whether SBC's post-legislation rates are TELRIC compliant. That question is directly related to the Commissions Checklist Item 2 recommendation to the FCC.

SBC argues that the contention that SB 855 will create UNE rates that are not TELRIC compliant is "pure speculation". (SBC Response at 4) However, the only way to end that "speculation" is for the Commission to hear evidence regarding SBC's TELRIC compliance. Since the Commission is currently in the midst of deciding whether SBC complies with Checklist Item 2, now is the time to make that decision.

Public Interest Analysis

Finally, SBC makes the incredible claim that the Commission has no say in the public interest analysis. That claim would obviously be news to the ALJ, whose public interest section from the PEPO contained approximately 140 pages of discussion. SBC's claim also ignores the fact that other states' have regularly made public interest recommendations during 271 proceedings. SBC's point here seems to be "let the FCC handle it". The problem with that position, however, is the fact that the ICC must create an "adequate factual record" that the FCC is able to rely on to determine whether a local telecommunications market "is, and will remain, open to competition." (See In the Matter of Ameritech Michigan, 12 FCC Rcd 20,543 at ¶ 386)

The Commission should analyze whether SB 885's mandate of certain fill factors and depreciation rates in setting unbundled loop rates leased by competitors would create such a price squeeze. Moreover, SB 885, as amended by Amendment 1, would relieve SBC of the obligation otherwise imposed by 220 ILCS 5/13-505.1 to adjust its retail rates for the changes in its unbundled loop rates based on the "imputation" test prescribed by Section 13-505.1. SB 885 therefore creates two certainties: within 30 days of May 9, 2003, UNE rates will rise to a level that can be predicted with some

[23] Since SB 885 was enacted, McLeod's Motion is no longer "conditional".

precision and retail rates must remain the same. Thus, there is no speculation over the fact that SB 885 will immediately raise UNE rates to a level that will be higher than retail rates in all parts of SBC's territory. The Commission should therefore reopen the record in order to determine how SBC could possibly pass the public interest test given this new relationship between wholesale and retail rates.

CIMCO, Forte and XO state that the Commission should decline to follow SBC's recommendations, and instead adopt the Motion of McLeodUSA Telecommunications Inc. to reopen the record pursuant to 83 Ill. Adm. Code 200.870 and hold further hearings prior to issuance of the final Order to take evidence on the determinations to be made in this docket that are impacted by the enactment of SB 885.

SBC Illinois Reply:

SBC Illinois notes that the CLEC and governmental parties responding to McLeodUSA's Motion generally support it. With no factual support, SBC Illinois asserts, they claim that SB 885 will require the Commission to set UNE rates that are not TELRIC-compliant (CIMCO/Forte/XO Concurrence at 3) and/or that it will create a "price squeeze" (AT&T Response at 1; AG Response at 2-3; CIMCO/Forte/XO Concurrence at 3-4).

SBC Illinois' Response to McLeodUSA's Motion, it claims, pointed out hat any debate over whether the rates mandated by SB 885 are TELRIC-compliant, is premature. As new Section 13-408 makes clear, SBC Illinois asserts, the intent of the General Assembly is that the Commission implement TELRIC-compliant rates:

> "The General Assembly finds and determines that it should provide direction to the Illinois Commerce Commission regarding the establishment of the monthly recurring rates that such incumbent local exchange carriers shall charge other telecommunications carriers for unbundled loops, whether provided on a standalone basis or in combination with other unbundled network elements, in order to ensure (i) that such rates are consistent with the requirements of the federal Telecommunications Act of 1996, the regulations promulgated thereunder, and subsection (g) of Section 13-801 of this Act, and (ii) that such incumbent local exchange carriers are able to recover the efficient, forward-looking costs of creating, operating, and maintaining the network outside plant infrastructure capacity and switching and transmission network capacity necessary to permit such incumbent local exchange carriers to meet in a timely and adequate fashion the obligations imposed by Section 8-101 of this Act." (Emphasis added).

Similarly, SBC Illinois sets out that Section 13-408(a) provides that the Commission shall employ fill factors that "represent a reasonable projection of actual usage of the

elements in question, in accordance with applicable federal law" (emphasis added). On the whole of this basis, SBC Illinois asserts, this Commission cannot, and should not, assume that the UNE loop rates resulting from SB 885 will be unlawful.

According to SBC Illinois, it also explained in its Response that the Federal Communications Commission ("FCC") has established clear policies on the price squeeze issue raised by the CLECs and the AG. Notably, SBC Illinois argues, their price squeeze claims are based solely on rhetoric. But, in any event, SBC Illinois asserts, this is an issue that can and should be presented to the FCC. Based on analyses presented in Docket No. 02-0864 (now abated), SBC Illinois contends that it would anticipate no problem at the FCC in this regard. In short, SBC Illinois none of the arguments raised by the CLECs or the AG in their responses change the fact that the Commission can and should adopt a final order in this proceeding.[24]

Staff Reply:

The Staff of the Illinois Commerce Commission ("Staff"), filed a reply to the various Responses set out on the pending McLeodUSA Motion.

In those responses, Staff notes, the parties lending support to McLeod's motion, argue that; (a) SB 885, if adopted, would require the implementation of rates that violate Checklist Item 2; and, (b) that a "price squeeze" would ensue, in violation of the doctrine enunciated in Sprint Communications Company, L.P. v. FCC, 274 F. 3d 549 (D.C. Cir. 2001).

The Staff takes no position on this motion, and neither supports nor opposes it. Staff would point out, however, that Section 271 authority is not necessarily a permanent state of affairs. In other words, Staff asserts, the FCC unquestionably has the power to suspend or revoke such authority. 47 U.S.C. §271 (d)(6)(A)(iii).

Indeed, Staff observes Section 271 (d)(6) to provide as follows:

> If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing--
>
> (i) issue an order to such company to correct the deficiency;

[24] Remarkably, WorldCom suggests that the General Assembly's passage of SB 885 somehow deprived it of its "due process" rights. (WorldCom Response at 5-6). The legislative process is, by definition, open to all interested parties. In turn, the Commission is a creature of statute and must implement that which the legislature requires. If WorldCom believes that the legislature's actions were improper, that concern should be directed to the judiciary – not this Commission.

> (ii) impose a penalty on such company pursuant to title V [*47 USCS § 501* et seq.]; or
>
> (iii) suspend or revoke such approval. 47 U.S.C. §271(d)(6)(A)

Accordingly, Staff asserts, if the consequences alleged likely to occur – namely, a Checklist Item 2 violation or a price squeeze – do indeed occur, the Commission is not without a remedy. It can, Staff points out, petition the FCC for an investigation and the imposition of sanctions enumerated under Section 271(d)(6)(A).

Commission Discussion and Ruling:

As we consider the motion pending before us, the Commission reviews the pertinent facts and law that govern the matter at hand together with all of the relevant arguments.

At the outset, we know that in assessing checklist compliance, the FCC reasonably and consistently, looks at rates as they exist at the time of filing. Potential future rate changes do not impinge on the FCC's review. Yet, it is precisely the question of future rates that McLeodUSA (and WorldCom) would bring into view. Our Phase I order settled this dispute, was consistent with the law, and need not be revisited.

We view the Motion, much as SBC Illinois describes it, to operate on the assumption that the General Assembly's action will ultimately produce TELRIC non-compliant rates. While this end is nowhere in sight, the legal authority works against McLeod's position. It is well-settled that, the legislature is presumed to act rationally and to know the law when enacting statutes. State v. Mikusch, 562 N.E. 2d 168 (1990). As such, and at this stage, we might only consider that the General Assembly was duly aware of TELRIC pricing and all associated federal rules and regulation as well as any other relevant state statutes when taking action. If anything, the legislation cited by SBC Illinois, i.e., Section 13-408, makes this abundantly clear.

At this point in time, having not even begun to implement the terms of the new law, the Commission is simply unable to render any reasoned determination as to the resulting rate levels. Nor is it reasonable for the Commission to work at implementing the General Assembly's directions in one docket and at the same time conduct another seemingly redundant hearing for this proceeding. The FCC does not require such action, and to the extent that the final rates are anything less than TELRIC compliant, McLeodUSA, as well as WorldCom or any other CLEC has full and ample legal recourse to remedy the situation. Contrary to what WorldCom would assert, it will have not lost any available process including the opportunity to address its concerns with the FCC.

It is also well-established that, the "public interest" test was delegated by Congress to the FCC. So too, It is clear from our reading of the opinions in Sprint Communications Company v. FCC, 274 F.3d 549 (D.C. Cir. 2001), and WorldCom, Inc. v. FCC, 308 F.3d 1 (D.C. Cir. 2002), that the FCC is required to consider the "price

squeeze" issue as part of its public interest analysis. But, that is the very point to be derived from these court reviews. In other words, the courts have expressly recognized the issue to be a FCC matter. And, even in the remands to the FCC, neither opinion interfered with the respective Section 271 applicant's authority. This too, demonstrates these courts' acknowledgment that the FCC's public interest analysis is dependent not on one, but on the whole of the many matters it deems relevant to a reasoned decision on the matter.

Owing to these court opinions too, we see that the FCC has developed experience in the types of factors it considers and the standards that underlie those factors. This Commission has gone far in assessing the public interest, but it well knows that such an analysis is a federal standard not delegated to the state under Section 271. So too, the time is not nearly ripe for a price squeeze analysis that the FCC itself assesses under standards of its own making. In this Commission's view, the FCC is ideally and best suited to evaluate not only any price squeeze analyses but also the overall context in which such evidence is to be considered. We need not and will not intrude on its work.

All in all, the Commission, its Staff and the parties have worked long and hard to develop a comprehensive record in this proceeding. Our Final Order on this investigation reflects this massive effort, addresses the situation today, and will competently move us all to the next stage. On the other hand, the Motion would freeze for some extended period of time, and on the basis of nothing more than speculation, the action we are prepared to take. Neither the FCC's pronouncements,
nor our own reasoned judgment, permits such an end.

For all these reasons, the Motion of McLeodUSA is hereby denied.

Note: ALJ Zaban was kind enough to assist in the legal research needed for this ruling. ALJ Brodsky also helped in my pursuit of a certain document.

EM:jt